APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
For The Northern District Of Illinois
Eastern Division

ANN ANASTASIA, et al.,

Plaintiffs,

v.

COSMOPOLITAN NATIONAL BANK, 2135 S. MICHIGAN CORPORATION, an Illinois corporation, et al.,

Defendants.

No. 72 C 2303

MEMORANDUM OPINION AND ORDER

This suit was originally filed pursuant to 42 U.S.C. §1983. It is an action seeking declaratory and injunctive relief against the enforcement of the Illinois Innkeeper's Lien Law, Ch. 71 §2 and Ch. 82 §57 of the Illinois Revised Statutes, and seeking damages which the individual named plaintiffs have allegedly suffered at the hands of the named defendant innkeepers. Since the filing of this lawsuit two years ago, both plaintiffs and defendants have evolved into classes under Rule 23, F.R.C.P. At no time have any of the defendants challenged the jurisdiction of this Court. The parties are now before the Court on a motion for summary judgment filed by the plaintiffs.

Consideration of the summary judgment issue has caused the Court to advert *sua sponte* to the question whether jurisdiction exists under 42 U.S.C. §1983. This section provides relief to any person who "under color of any statute, ordinance, regulation, custom, or usage, of

any State or Territory", is subjected to a violation of his rights under the constitution of the United States. The problem in the instant case is that the wrongs complained of, the detention of the plaintiffs' personal property by the defendants, involve no action of any official of the State of Illinois or any action under color of State authority. Judge Abraham Lincoln Marovitz [sic] has found an analogous factual situation sufficient to confer jurisdiction on the Federal courts. *Collins* v. *Viceroy Hotel Corp.*, 338 F. Supp. 390 (1972). Although this Court gives great weight to the opinion of Judge Marovitz, it must be noted that his is one of several opinions which stand on one side of a very definite split of authority on this issue.

The situations wherein it is found that there is action by private individuals "under color" of state law involve circumstances clothing individuals with a sovereign authority to a much greater degree than the facts here reveal. Examples would be where the state acts as a silent partner in the actions of which complaint is made, *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715, 6 L.Ed.2d 45. 81 S.Ct. 856), or where state law compels a private individual to deprive another of his rights (*Adickes* v. *S.H. Kress & Co.,* 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142).

The application of Section 1983 requires a situation where an individual performs an essentially public or governmental function under a delegation of authority by the state, such that his action must be characterized as "under color" of state law.

The Court of Appeals for this circuit recently refused to extend this concept to a suit against a garageman who had exercised his authority under the Indiana Mechanics Lien Law. *Phillips* v. *Maney,* No. 72-1772 (7th Cir. Sept.

13, 1974). The only case in which the Supreme Court has found action to be "under color" of state law, where both the action and the impetus therefor were private, is *Reitman* v. *Mulkey,* 387 U.S. 369, 87 S.Ct. 1627, 18 L.Ed.2d 830. The *Reitman* case is relied on heavily by those courts which have held that jurisdiction exists under §1983. There are, however, a line of cases which distinguish the *Reitman* situation from situations similar to that here. *Oller* v. *Bank of America,* 342 F.Supp. 21 (N.D. Cal. 1972); *Kirksey* v. *Theilig,* 351 F.Supp. 727 (D. Colo. 1972); *Baker* v. *Keeble,* 362 F.Supp. 355 (M.D. Ala. 1973). The rationale in *Kirksey* v. *Theilig, supra,* is particularly persuasive. 351 F.Supp. 727, 731. In *Reitman,* the purpose of a California constitutional provision was held to be void under the Constitution of the United States because it circumspectly authorized racial discrimination against home buyers, which had been forbidden by state law. The fact that racial discrimination was involved, an area in which the states have long exercised indirect power to further constitutional ends, was a controlling factor in the Supreme Court's decision.

More recently, in *Moose Lodge No. 107* v. *Irvis,* 407 U.S. 163 (1972), the Supreme Court stated:

> "The Court has never held, of course, that discrimination by an otherwise private entity would be violative of the Equal Protection Clause if the private entity receives any sort of benefit or service at all from the state, or if it is subject to state regulation in any degree whatever . . . Our holdings indicate that where the impetus for the discrimination is private, the state must have 'significantly involved itself with invidious discriminations', [citing *Reitman*], in order for the discriminatory action to fall within the ambit of the constitutional prohibition." p. 173

Moose Lodge involved racial discrimination by private clubs which were licensed to sell liquor by the state. The Court refused to find action "under color" of state law.

An individual who exercises the authority granted him by the state under the Illinois Innkeeper's Lien Law is bringing about a very minimal involvement of the state's police power. The impetus for the action is private, and the action is carried out without the aid of any state personnel. This Court will not conclude that the state's authorization for the action is "significant involvement". Accordingly, this action must be dismissed for lack of jurisdiction.

Enter:

/s/ *Frank J. McGarr*
United States District Judge

Dated: September 30, 1974

APPENDIX B

In the

United States Court of Appeals

For the Seventh Circuit

No. 74-1995

ANN ANASTASIA, et al.,

Plaintiffs-Appellants,

vs.

THE COSMOPOLITAN NATIONAL BANK OF CHICAGO, etc., et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Illinois,
Eastern Division.
No. 72C 2303
FRANK J. McGARR, Judge.

Argued June 6, 1975—Decided September 30, 1975

Before MOORE, *Senior Circuit Judge,** CUMMINGS, and BAUER, *Circuit Judges.*

* Senior Circuit Judge Leonard Page Moore of the United States Court of Appeals for the Second Circuit was sitting by designation.

MOORE, *Senior Circuit Judge:* Illinois Revised Statutes ch. 82, §57[1] and ch. 71, §2[2] give hotelkeepers a lien on the

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[1] The statute provides:

Hotel, inn and boarding house keepers shall have a lien upon the baggage and other valuables of their guests or boarders brought into such hotel, inn or boarding house by such guests or boarders, for the proper charges due from such guests or boarders, for their accommodations, board and lodgings and such extras as are furnished at their request.

[2] The statute provides:

Every hotel proprietor shall have a lien upon all the baggage and effects brought into said hotel by his guests for any and all proper charges due him from such guests for hotel accommodations, and said hotel proprietor shall have the right to detain such baggage and effects until the amount of such charges shall have been fully paid, and unless such charges shall have been paid within sixty days from the time when the same accrued, said hotel proprietor shall have the right to sell such baggage and effects at public auction after giving ten days' notice of the time and place of such sale, by publication of such notice in a newspaper of general circulation in the county in which said hotel is situated, and also by mailing, ten days before such sale, a copy of such notice addressed to such guest at his post office address, if known to said hotel proprietor, and if not known, then to his place of residence registered by said guest in the register of such hotel; and after satisfying such lien out of the proceeds of such sale, together with any costs that may have been incurred in enforcing said lien, the residue of said proceeds of sale, if any, shall, within six months after such sale, on demand, be paid by said hotel proprietor to such guest; and if not demanded within six months from the date of such sale, such residue or remainder shall be deposited by such hotel proprietor with the county treasurer of the county in which such hotel is situated, together with a statement of such hotel proprietor's claim, the amount of costs incurred in enforcing the same, a copy of the published notice, and the amount received from the

personal property brought into their establishments by guests to the extent of charges incurred for lodging, board or other services.[3] Ch. 71, §2 also authorizes the hotelkeeper to detain and eventually, upon continued nonpayment of charges, after notice to the guests[4] to sell such property in order to realize on the lien. Such a sale bars any subsequent action against the hotel proprietor for the recovery of the property or the value thereof. This case represents a constitutional challenge to these provisions.

(Footnote continued)

sale of said property so sold at said sale; and said residue shall, by said county treasurer, be accredited to the general revenue fund of said county, subject to the right of said guest or his representative to reclaim the same at any time within three years from and after the date of such deposit with said county treasurer, and such sale shall be a perpetual bar to any action against the hotel proprietor for the recovery of such baggage or property, or of the value thereof, or for any damages growing out of the failure of such guest to receive such baggage or property.

[3] Ill. Rev. Stat. ch. 71, §4c defines "hotel" as follows:
The word "hotel" within the meaning of this act includes every building or structure kept, used, maintained, advertised, and held out to the public to be a place where lodging, or lodging and food, or apartments, or suites, or other accommodations are offered for adequate pay to travelers and guests, whether transient, permanent, or residential, in which 25 or more rooms are used for the lodging, or lodging and food, or apartments, or suites, or other accommodations of such guests.

[4] Similar, but not identical, sale provisions for realization on the lien provided by ch. 57, §82 are contained in Ill. Rev. Stat. ch. 141, §3.

I.

The named plaintiffs in this class action were residents of hotels located in Chicago. In each instance they returned to their rooms one day to find that the hotelkeeper had either changed or "plugged" the lock on the door to the room so that the plaintiffs were unable to gain admittance. Upon inquiry, each plaintiff was told by their respective hotelkeepers that they would not be readmitted and the personal property that had been located in the room would not be released until such time as arrearages in rent had been paid. When efforts by the plaintiffs and their attorneys to regain possession of their property proved unavailing, this lawsuit was filed.[5]

The suit, brought under 42 U.S.C. §1983 and its jurisdictional counterpart, 28 U.S.C. §1343, challenged the seizures of the personal possessions of the plaintiffs as both a deprivation of property without due process of law in violation of the Fourteenth Amendment in that no notice or hearing in which the plaintiffs could raise defenses to the alleged nonpayments of rent[6] was provided, and an unreasonable search and seizure in contravention of the Fourth Amendment. In addition to damages, the plaintiffs sought a declaration that ch. 82, §57 and ch. 71, §2 were unconstitutional and an injunction restraining the defen-

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[5] The property of plaintiffs Anastasia and Smith has now been returned to them. Plaintiff Glass was offered the return of his property, but he refused to accept it on the ground that certain items were missing.

[6] *See North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U.S. 601 (1975); *Mitchell* v. *W. T. Grant, Co.*, 416 U.S. 600 (1974); *Fuentes* v. *Shevin*, 407 U.S. 67 (1972); *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969).

dants from acting pursuant to these sections. On January 6, 1973, the district court granted leave to intervene as defendant to several of Chicago's large hotels, and on June 5, 1973, granted plaintiffs' motion to proceed as a plaintiff and defendant class action.[7]

After the plaintiffs had submitted a motion for summary judgment, the district court *sua sponte* raised the issue of state action and issued a memorandum dismissing the complaint for lack of jurisdiction upon concluding that the action of the defendant hotels was not taken "under color" of law within the meaning of 42 U.S.C. §1983.[8] From the judgment entered thereon, the plaintiffs appealed. We affirm.

Ever since the *Civil Rights Cases*, 109 U.S. 3 (1883), it has been recognized that the Fourteenth Amendment serves as a limitation only on governmental action and does not affect purely private conduct. But while this

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[7] The district court defined the plaintiff class as:

> Those persons in Chicago, Illinois, except for the owners, managers and operators of hotels, whose personal property is now detained by a hotel pursuant to the Illinois Innkeepers' Lien Law.

The defendant class included:

> Those owners, managers, and operators of hotels in Chicago, Illinois, who now have the personal property of the class of plaintiffs detained pursuant to the Illinois Innkeepers' Lien Law.

[8] We note that the proper disposition, given the district court's conclusion, would have been to dismiss the claims for failure to state a claim upon which relief could be granted. *Bell* v. *Hood*, 327 U.S. 678 (1946); *Adams* v. *Southern California First National Bank*, 492 F.2d 324, 338 (9th Cir. 1973), *cert. denied*, 419 U.S. 1006 (1974).

proposition is easily stated, the distinction between governmental and private action is seldom very clear. With increasing frequency in recent years, the federal courts have been drawn into the sphere of creditor-debtor relations to decide whether certain statutorily authorized creditor conduct constitutes action "under color" of state law within the meaning of section 1983,[9] or, what is essentially the same question,[10] whether the conduct is "state action" under the Fourteenth Amendment. A number of cases have considered the issue in the context of the self-help repossession remedy provided to secured creditors by sections 9-503 and 9-504 of the Uniform Commercial Code.[11] Only last year this court considered an Indiana common law and statutory mechanic's lien, finding no state action where an automobile repairman detained a

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[9] 42 U.S.C. §1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof by the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

[10] *United States* v. *Price*, 383 U.S. 787, 794 n.7 (1966); *Phillips* v. *Money*, 503 F.2d 990, 992 (7th Cir. 1974), *cert. denied*, 420 U.S. 934 (1975).

[11] To cite only the cases decided by the Circuit Courts of Appeals which have unanimously held that these provisions of the UCC are not a basis for finding state action: *Calderon* v. *United Furniture Co.*, 505 F. 2d 950 (5th Cir. 1974); *Brantley* v. *Union Bank & Trust Co.*, 498 F.2d 365 (5th Cir.), *cert. denied*, 419 U.S. 1034 (1974); *James* v. *Pinnix*, 495 F.2d 206 (5th Cir. 1974); *Turner* v. *Impala Motors*, 503 F.2d 607 (6th Cir. 1974); *Gibbs* v. *Titelman*, 502 F.2d 1107 (3rd Cir.), *cert. denied*, 419 U.S. 1039 (1974); *Nichols* v. *Tower Grove Bank*, 497 F.2d 404 (8th Cir. 1974); *Nowlin* v. *Professional Auto Sales, Inc.*, 496 F.2d 16 (8th Cir.), *cert.*

car after the owner refused to pay the bill for repairs. *Phillips* v. *Money*, 503 F.2d 990 (7th Cir. 1974), *cert. denied*, 420 U.S. 934 (1975). And the context in which the state action question in this case arises—detention of personal property pursuant to a statutory landlords' or innkeepers' lien—is by no means unique, having been the subject of a number of court decisions.[12] In fact, detention of property under authority of the very statutes challenged herein has in another case been declared unconstitutional by the United States District Court for the Northern District of Illinois. *Collins* v. *Viceroy Hotel Corp.*, 338 F. Supp. 390 (N.D. Ill. 1972).[13]

(Footnote continued)

denied, 419 U.S. 1006 (1974); *Bichel Optical Laboratories, Inc.* v. *Marquette National Bank of Minneapolis*, 487 F.2d 906 (1974); *Adams* v. *Southern California First National Bank*, 492 F.2d 324 (9th Cir. 1973), *cert. denied*, 419 U.S. 1006 (1974). For related state action cases see also *Bryant* v. *Jefferson Savings & Loan Assn.*, 509 F.2d 511 (D.C. Cir. 1974); *Hardy* v. *Gissendaner*, 508 F.2d 1207 (5th Cir. 1975); *Fletcher* v. *Rhode Island Hospital Trust National Bank*, 496 F.2d 927 (1st Cir.), *cert. denied*, 419 U.S. 1001 (1974); *Bond* v. *Dentzer*, 494 F.2d 302 (2d Cir.), *cert. denied*, 419 U.S. 837 (1974); *Shirley* v. *State National Bank of Connecticut*, 493 F.2d 739 (2d Cir.), *cert. denied*, 419 U.S. 1009 (1974).

[12] *Davis* v. *Richmond*, 512 F.2d 201 (1st Cir. 1975) (innkeepers' lien; no state action); *Hall* v. *Garson*, 430 F.2d 430 (5th Cir. 1970) (landlords' lien; state action); *Johnson* v. *Riverside Hotel, Inc.*, 44 U.S.L.W. 2075 (S.D. Fla. 1975) (innkeepers' lien; state action); *Barber* v. *Rader*, 350 F. Supp. 183 (S.D. Fla. 1972) (landlords' lien; state action); *Klim* v. *Jones*, 315 F. Supp. 109 (N.D. Cal. 1970) (innkeepers' lien; state action); *Holt* v. *Brown*, 336 F. Supp. 2 (W.D. Ky. 1971) (landlords' lien; state action); *Blye* v. *Globe Wernicke Realty Co.*, 33 N.Y. 2d 15, 300 N.E. 2d 710, 347 N.Y.S. 2d 170 (1973) (innkeepers' lien; state action).

[13] The district court in this case cited *Collins*, which had not been brought as a class action, and although giving "great weight" to that opinion, noted that it was but "one of several opinions which stand on one side of a very definite split of authority" on this issue.

Before moving to an analysis of the plaintiffs' contentions, it is important to note that this case involves only the seizure of personal property by the defendant hotels. There have been no sales of the property of the named plaintiffs although ch. 71, §2 authorizes sales under certain conditions. And the plaintiff class is defined as "[t]hose persons . . . whose personal property is now detained by a hotel. . . ." (*See* note 7 *supra*). There is no mention made of a sale. Therefore, we have in this case no occasion to consider whether a statutorily authorized sale, with the concomitant bar on any subsequent action by a guest against a hotel proprietor for the recovery of any property or the value thereof, would constitute state action. *Cf., Lucas* v. *Wisconsin Electric Power Co.*, 466 F.2d 638, 656 (7th Cir. 1972) (en banc), *cert. denied*, 409 U.S. 1114 (1973) (State had authorized electric company to enter private property but that authority had not been invoked in the case at bar; had it been invoked, "an entirely different issue would [have been] presented.") It is appropriate, however, to note Mr. Justice Clark's caveat made with regard to state action cases: " 'Differences in circumstances . . . beget appropriate differences in law. . . .' " *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 726 (1961), *quoting, Whitney* v. *Tax Commission*, 309 U.S. 530, 542 (1940).

The plaintiffs advance two theories under which they contend that state action is present in this case. The first might properly be termed an "entwinement"[14] theory whereby the state has assertedly significantly involved itself in the action of the hotelkeepers, so as to make the

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[14] *See* Clark & Landers, Sniadach, Fuentes *and Beyond: The Creditor Meets the Constitution*, 59 Va. L.Rev. 355, 379 (1973).

acts of these private individuals state action for the purposes of the Fourteenth Amendment and section 1983. The second theory is the so-called "public function" theory: that the State of Illinois has allowed hotel proprietors to perform a governmental function in enforcing their lien, and therefore that their actions must be governed by constitutional limitations.

A. *Entwinement*

The proper focus for determining whether state action exists under this theory was recently stated by the Supreme Court as follows:

> [T]he inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself.

Jackson v. *Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974) (holding that the termination of electric service by a public utility for nonpayment of bills was not state action). The test is whether the state has significantly involved itself in the challenged conduct. *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163, 173 (1972). And a conclusion as to degree of involvement can be reached only by "sifting facts and weighing circumstances." *Burton* v. *Wilmington Parking Authority, supra*, 365 U.S. at 722.

The plaintiffs argue that by passing a statute authorizing the private seizure of the possessions of hotel residents, the State of Illinois has lent affirmative support and encouragement to hotel proprietors. They point out that ch. 71, §2 in particular has altered the nature of the common law innkeepers' lien by expanding the class of establishments which can invoke it—a fact acknowledged by the defendants. At common law, the lien existed only in favor of innkeepers—one who took in transient guests,

was bound by law to do so, and was absolutely liable for injury to the guest's person or property. Keepers of boardinghouses or lodginghouses had no corresponding obligations and liabilities, and possessed no comparable lien until granted by statute.[15] Plaintiffs observe as well that Illinois has eliminated the principal *raison d'etre* of the common law innkeepers' lien by placing dollar ceilings on the extent of a hotelkeeper's liability and for some types of property abolishing absolute liability by requiring a showing of fault on the part of the hotelkeeper. *See* Ill. Rev. Stat. ch. 71, §§ 1, 3, 3.1, 4.

Primary reliance is placed on *Reitman* v. *Mulkey*, 387 U.S. 369 (1967), where the Supreme Court found state action in an amendment (art. 1, §26 [Proposition 14] to the California constitution providing that the state could not limit a person's right to rent or sell real estate to whomever he chooses. A black couple had sued under California statutes providing for equal accommodations, alleging that the defendants had refused to rent them an apartment solely on account of their race. The trial court rendered summary judgment for the defendants on the ground that the statutes had been rendered void by the adoption of art. 1, §26. The California Supreme Court reversed the trial court, and the Supreme Court affirmed that decision. While superficially *Reitman* is similar to this case—in both instances a state enactment authorized the actions of private individuals—we consider it by no means controlling. The immediate purpose of Proposition 14 was to override recently enacted state anti-discrimina-

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[15] *See* J. Beale, The Law of Innkeepers and Hotels §298 (1906); Hogan, *The Innkeeper's Lien at Common Law*, 8 Hastings L.J. 33 (1956).

tion legislation, including a fair housing act. The California Supreme Court, which was familiar with the background of the enactment and the milieu in which it would operate, had made a finding that the provision would have the effect of significantly involving the state in matters of private discrimination. By constitutionalizing the right privately to discriminate, the amendment immunized such conduct "from legislative, executive, or judicial regulation at any level of the state government." 387 U.S. at 377. It effectively removed the issue of private discrimination from the political arena, or at least placed severe handicaps on those striving for its elimination. *See* Black, *Foreword: "State Action," Equal Protection, and California's Proposition 14,* 81 Harv. L.Rev. 69, 81-82 (1967). Furthermore, Proposition 14 operated in direct opposition to an express constitutional goal embodied in the post-Civil War amendments: the elimination of racial discrimination. A number of courts have acknowledged that racial discrimination involved in a case may be an appropriate factor for consideration in the sifting and weighing of circumstances required in an analysis of state action questions. *E.g., Adams* v. *Southern California First National Bank, supra,* 492 F.2d at 333, and n.23; *Grafton* v. *Brooklyn Law School,* 478 F.2d 1137, 1142 (2d Cir. 1973) (Friendly, J.).

What is present in this case differs substantially from *Reitman.* The statutes involved here were not enacted in contravention of a constitutional goal. Ch. 82, §57 was passed in 1874 and ch. 71, §2 in 1909. Both provisions remain unchanged from their original form. To be sure, these provisions allowed hotel proprietors to take action that the common law did not previously permit. But we do not attach overriding significance to this limited expansion of the common law. It is but one consideration to

be included in the mix. The First Circuit has recently failed to be persuaded that a statutory expansion of the common law innkeepers' lien was basis for finding state action:

> The statute at issue is a fairly unremarkable product of the continuing legislative function to define creditors' rights. . . . If it goes beyond the common law, it does so merely by broadening the class (innkeepers) having traditional right to a possessory lien.

And even this modest change occurred 115 years ago. *Davis* v. *Richmond,* 512 F.2d 201, 203 (1st Cir. 1975), (citation omitted). And although the Supreme Court in *Jackson* v. *Metropolitan Edison Co., supra,* noted that there existed a common law right to terminate service for non-payment, 419 U.S. at 354 n.11, the Court apparently did not consider this a crucial factor in finding an absence of state action. At the turn of the century, the concept of due process had not evolved to its present-day point where summary repossession of property with participation of state officers is constitutionally impermissible in all but the most limited circumstances.[16] And it cannot be persuasively argued, in light of the then existing remedy of self-help for innkeepers and others, that the Fourteenth Amendment upon its enactment was intended to do away with summary self-help procedures. *Adams* v. *Southern California First National Bank, supra,* 492 F.2d at 337.

Nor do the hotelkeepers' remedies possess an exalted constitutional status where they are insulated from the possibility of legislative reforms. They are subject to the operation of normal political forces. This is also not a case in which the state has actively involved itself in the

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[16] See the cases cited in note 6 *supra.*

affairs of hotel proprietors. There is no continuing interdependence such as characterized the lessor-lessee relationship between the parking authority and the coffee shop in *Burton* v. *Wilmington Parking Authority.* Nor is there even an ongoing regulatory scheme such as the liquor licensing in *Moose Lodge* or the public utility regulation in *Jackson* v. *Metropolitan Edison Co.,* both of which the Supreme Court found were in any event an insufficient basis for finding state action. All that the State of Illinois has done is to enact statutes which permit a private hotel proprietor to detain the property of guests in an establishment owned by him. The statutes do not compel such a procedure. *See Adickes* v. *S.H. Kress & Co.,* 398 U.S. 144, 170-71 (1970); *Peterson* v. *City of Greenville,* 373 U.S. 244, 248 (1963); *Moose Lodge No. 107* v. *Irvis, supra,* 407 U.S. at 178-79 (Although State action was not otherwise present, it did exist where a state regulation required adherence to a racially restrictive bylaw). They merely permit it, much in the same way as Georgia law in *Evans* v. *Abney,* 396 U.S. 435 (1970), permitted interpretation of Senator Bacon's will to require the closing of a public park rather than apply the *cy pres* doctrine and make the park racially integrated. The impact on private ordering is minimal. *See* Burke & Reber, *State Action, Congressional Power and Creditors' Rights: An Essay on the Fourteenth Amendment,* 47 S. Cal. L.Rev. 1, 47 (1973). This degree of involvement falls short of the significant degree of encouragement or affirmative support necessary to the existence of state action.

B. *Public Function*

The actions of private individuals or entities on whom the state has conferred powers and functions traditionally exclusively reserved to the state may become subject to constitutional limitations. *E.g., Evans* v. *Newton,* 382 U.S.

296 (1966) (operation of a municipal park); *Terry* v. *Adams,* 345 U.S. 461 (1953) (conducting of a pre-primary election by a political organization); *Marsh* v. *Alabama,* 326 U.S. 501 (1946) (operation of a company-owned town). *See also Jackson* v. *Metropolitan Edison Co., supra,* 419 U.S. at 352-53 ("If we were dealing with the exercise by Metropolitan of some power delegated to it by the State which is traditionally associated with sovereignty, such as eminent domain, our case would be quite a different one."). The plaintiffs argue that by allowing hotel proprietors to seize the personal property located in a resident's room without any prior adjudication to the proprietor's claim for charges, the state has delegated a state function traditionally performed by officers of the law and court. The plaintiffs rely most heavily on *Hall* v. *Garson,* 430 F.2d 430 (5th Cir. 1970). There a private landlord had entered the dwelling of a tenant and removed a television set pursuant to a Texas statute giving landlords a lien on the personal property of their tenants. The court found state action on the ground that the landlord was performing what was ordinarily a state function:

> In this case the alleged wrongful conduct was admittedly perpetrated by a person who was not an officer or official of any state agency. But the action taken, the entry into another's home and the seizure of another's property, was an act that possessed many, if not all, of the characteristics of an act of the State. The execution of a lien, whether a traditional security interest or a quasi writ of attachment or judgment lien, has in Texas traditionally been the function of the Sheriff or constable.

Id. at 439.

Perhaps distinctions can be drawn between this case and *Hall,* but we do not think that they would be very satisfactory ones. For example, the Texas statute in *Hall*

expressly granted landlords the right to enter a dwelling by authorizing them "to take and retain possession" of "property found within the dwelling." *Id.* at 432 n.1. Ch. 71, §2 does not contain the same language, *cf. Calderon* v. *United Furniture Co.*, 505 F.2d 951 (5th Cir. 1974), but the right to enter a room may be implicit in the statute. Also, involved in this case is a hotel room, rather than an apartment or house. But there is no question that the plaintiffs in this case used the hotels as their principal long-term residences. Thus, the distinctions do not cut very deeply. Fundamentally, we simply disagree with the result in *Hall*.[17] The historical accuracy of that case's assertion that the execution of liens was traditionally a state function has been questioned. Burke & Reber, *State Action, Congressional Power and Creditors' Rights: An Essay on the Fourteenth Amendment*, 47 S. Cal. L. Rev. 1, 50 (1973). And this assessment seems correct, except insofar as *Hall* may have relied on particular characteristics of prior Texas law. Plaintiffs freely acknowledge the hoary nature of the innkeepers' lien, and a landlord's right to seize property of a tenant whose rent is in arrears has common law roots as well.[18] Thus, while the sheriff un-

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[17] Because we are choosing one of the views on which there is a conflict between circuits, this opinion was circulated, before filing, to all judges of this Court in regular active service. A majority voted against a hearing *en banc* on this issue, but Judges Swygert and Stevens voted for such a hearing.

[18] 2 F. Pollock & F. Maitland, The History of English Law 576 (2d ed. 1898). In Illinois a landlord has the right to seize and detain the property of a nonpaying tenant, Ill. Rev. Stat. ch. 80, §16, although apparently only after a distress proceeding has been commenced. *Cottrell* v. *Gerson*, 296 Ill. App. 412, 16 N.E. 2d 529 (1938), *aff'd*, 371 Ill. 174, 20 N.E. 2d 74 (1939).

Other courts have recognized the existence of some form of self-help repossession at common law. *E.g., Gibbs* v. *Titelman*, 502 F.2d 1107, 1114 (3d Cir.), *cert. denied*, 419 F.2d 1039 (1974); *Adams* v. *Southern California First National Bank, supra*, 492 F.2d at 337.

questionably is often the party who executes a lien, the function can hardly be said to be traditionally and exclusively that of the state. At most it is one that has been shared by the state with private persons. We see little similarity between this case and the public function cases decided by the Supreme Court and therefore find no basis for concluding that there is state action here.

Because we hold that there is no state action, we have no occasion to consider whether the actions of the hotel proprietors would be violative of the Fourth or Fourteenth Amendments had state action been present.[19]

AFFIRMED.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

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[19] We note that the plaintiffs are not left remediless if their property was seized without good cause. They should be entitled to bring an action for replevin and collect whatever damages might have been caused by the loss of their property. Ill. Rev. Stat., ch. 119, §1, *et seq.* (Supp. 1975-76).

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHARLES CULBERTSON and HELEN CULBERTSON, his wife,

Plaintiffs-Appellants,

vs.

ALICE LELAND, TRANSAMERICA TITLE INSURANCE COMPANY OF ARIZONA, a corporation and HARRY DOLINS,

Defendants-Appellees.

No. 73-1749
[October 3, 1975]

Appeal from the United States District Court of Arizona

OPINION

Before: ELY and CHOY, Circuit Judges,
and WEIGEL, District Judge*

WEIGEL, District Judge:

The Arizona Innkeeper's Lien Statute authorizes the keeper of a hotel or lodging house to seize, without notice or judicial procedure, the personal property of a lodger who fails to pay rent. This appeal presents the question whether a private person acting under the authority of the statute does so under color of state law within the meaning of 42 U.S.C. §1983.

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* Honorable Stanley A. Weigel, United States District Judge, Northern District of California, sitting by designation.

In September 1972, Helen and Charles Culbertson moved into a room in the New Windsor Hotel in Phoenix, Arizona, for which they agreed to pay twenty dollars per week. For several weeks they paid their rent on time, but in November they fell one week in arrears and were evicted by the hotel manager, Alice Leland. At eviction, she seized, as security for the unpaid rent, personal possession of the Culbertsons which remained in the room. Leland was at no time an official of the State of Arizona. She sought no help from state officials and received none, except that a member of the Phoenix police department told her she had the right to hold her tenants' belongings.

The Culbertsons sued in federal district court for the return of their possessions: for declaratory and injunctive relief against the provisions of the Arizona Innkeeper's Lien Statute (set forth in full in the margin)[1]; and for

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[1] Arizona Revised Statutes (1956):

§ 33-951. Lien on baggage and property of guests

Hotel, inn, boarding house, lodging house, apartment house and auto camp keepers shall have a lien upon the baggage and other property of their guests, boarders or lodgers, brought therein by their guests, boarders or lodgers, for charges due for accommodation, board, lodging or room rent and things furnished at the request of such guests, boarders or lodgers, with the right to possession of the baggage or other property until the charges are paid.

§ 33-952. Sale of property; notice

A. When baggage or other property comes into the possession of a person entitled to a lien as provided by § 33-951 and remains unclaimed, or the charges remain unpaid for a period of four months, the person may proceed to sell the baggage or property at public auction, and from the proceeds retain the charges, storage and expense of advertising the sale.

B. The sale shall not be made until the expiration of four weeks from the first publication of notice of the sale, published in a newspaper once a week for four consecutive weeks. The

damages under 42 U.S.C. §1983 on the claim that the seizure of their property was made under color of state law and, in the absence of notice and hearing, violated their constitutional right to due process of law. After suit was filed, Leland abandoned her claimed lien and returned the Culbertsons' belongings to them. She and her two co-defendants, the record owner and the beneficial owner of the New Windsor Hotel, then moved to dismiss. The court granted the motion on the ostensible ground that since Leland no longer asserted a lien, any challenge to the Innkeeper's Lien Statute was moot, and that the court lacked jurisdiction. Clerk's Record at 128-29. Subsequently the court also denied a motion to vacate its dismissal order. C.R. at 157. The Culbertsons appeal in forma pauperis.

The jurisdictional issue presented by the appeal is easily resolved. If appellants' demand for damages under 42 U.S.C. §1983 survives, so too does federal jurisdiction. *Lidie* v. *California*, 478 F.2d 552, 554 (9th Cir. 1973). In their complaint the Culbertsons sought $10,000 compensatory damages for the period for which they were deprived

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(footnote continued)

notice shall contain a description of each piece of property, the name of the owner, if known, the name of the person holding the property, and the time and place of sale. If the indebtedness does not exceed sixty dollars, the notice may be given by posting at not less than three public places located at the place where the hotel, inn, boarding house, lodging house, apartment house or auto camp is located.

C. Any balance from the sale not claimed by the rightful owner within one month from the day of the sale shall be paid into the treasury of the county in which the sale took place, and if not claimed by the owner within one year thereafter, the money shall be paid into the general fund of the county.

of their medicines and other belongings. That claim is cognizable under 42 U.S.C. §1983, *Donovan* v. *Reinbold,* 433 F.2d 738, 743 (9th Cir. 1970), and it remains a live issue despite Leland's renunciation of the claimed lien. It was error to dismiss for lack of jurisdiction. *See* C.R. at 129, lines 12-14.

However, if the ground of dismissal was failure to state a cause of action, and if there was such a failure, the dismissal should be affirmed. *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.,* 341 U.S. 246, 249-50 (1951). In this case the district court was concerned with, and requested briefs on, the effects of *Ouzts* v. *Maryland National Insurance Co.,* 470 F.2d 790 (9th Cir. 1972). *See* Reporter's Transcript at 6-7; Appellees' Brief at 3. (*Ouzts* has subsequently been reheard en banc and has been reaffirmed. 505 F.2d 547 (9th Cir. 1974).) The central issue in *Ouzts* was whether defendants who were not state officials had acted under color of state law. From the emphasis in the briefs below, from the interpretation of appellees (Appellees' Brief at 5-6), and from the district court's oral statements (R.T. at 6-7), it is apparent that what underlay the dismissal here was the conclusion that Leland's actions were not, as a matter of law, taken under color of state law, and thus did not give rise to a federal cause of action under 42 U.S.C. §1983. We therefore take up that issue.

It is settled that §1983 covers some actions taken by private citizens. The principle established by the Supreme Court, and often repeated, is that

> Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken "under color" of state law.
>
> *United States* v. *Classic,* 313 U.S. 299, 325-26 (1941).

In factual settings very similar to the present one, one circuit has found state action in a landlord's exercise of a lien against the possessions of a tenant, *Hall* v. *Garson*, 430 F. 2d 430 (5th Cir. 1970), and one circuit has found no state action. *Davis* v. *Richmond*, 512 F.2d 201 (1st Cir. 1975).

The leading case in our circuit is *Adams* v. *Southern California First National Bank*, 492 F.2d 324 (9th Cir. 1973), *rehearing en banc denied, cert. denied*, 419 U.S. 1006 (1974). In *Adams*—the facts of which are outlined below—we held that a private person's use of the self-help repossession provisions of the Uniform Commercial Code, as adopted by the state of California, did not amount to action "under color" of state law, and that therefore a due process challenge to the repossession statutes failed to state a federal cause of action, 492 F.2d at 329. The opinion warned that "[s]tatutes and laws regulate many forms of purely private activity, such as contractual relations and gifts, and subjecting all behavior that conforms to state law to the Fourteenth Amendment would emasculate the state action concept." 492 F.2d at 330-31. The existence of a state statute authorizing certain private action "is not the final answer to the touchstone of state action." 492 F.2d at 330. Equating the "under color" requirement of §1983 with the state action requirement of the Fourteenth Amendment, *Adams* gauged the repossession activity by the "significant state involvement" test derived from *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961), and *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163 (1972), 492 F.2d at 330-31. Because the statute in *Adams* merely codified a right already present in the common law, 492 F.2d at 330, and because the right involved, arising from a written contract, was essentially "a private remedy rather than a [delegated] state power," 492 F.2d at 336, the involvement of the state in enacting the statute was found

not significant. On the latter ground *Hall* v. *Garson, supra,* was distinguished; the authority exercised under the Texas landlord's lien statute was found to be of a type which "was normally exercised by the State and had historically been a function of the State of Texas." 492 F.2d at 336. It is worth noting that when this court sat en banc to reconsider the state action issue in *Ouzts,* it followed the same approach as *Adams,* focusing on common law antecedents and private contractual rights. *See* 505 F.2d at 550-54.

The transactions in *Adams* were installment purchases of automobiles. The purchasers signed written security agreements which explicitly set forth the sellers' right to repossess on default; and title remained with the sellers, 492 F.2d at 328. The eventual repossessions were only of the chattels covered by the security agreements—the automobiles—and they were performed by the title holders. They were thus as much a matter of private contractual law as of state statute.

The *Adams* holding is limited to repossession of a chattel subject to a specific security agreement. When a creditor, acting solely on the authority of statute, takes possession of a debtor's property which is unrelated to the debt and which is not subject to prior contractual agreement, we cannot say that *Adams* dictates the conclusion that no state action is involved. As in *Adams,* therefore, we must look to the elements of the case to determine whether Arizona has significantly involved itself in the actions of appellee Leland.

A. *Rights at Common Law*

It is apparent that, as in *Davis* v. *Richmond, supra,* the lien statute here gave Leland a right which she would not

have had at common law. At common law only innkeepers —and not hotel, boarding house and lodging house keepers —had a lien on the belongings of their guests.

Beginning in medieval times, an innkeeper had the nearly absolute duty at common law to take in all travelers and to accept their belongings for safekeeping. With minor exceptions he was absolutely liable to his guests for the full value of those belongings. At the same time, the common law gave him a lien on such property until the bill of its owner was paid. *See generally Klim* v. *Jones,* 315 F. Supp. 109, 118-20 and authorities cited. The leading English case is *Mulliner* v. *Florence,* [1878] 3 Q.B. 484.

Historians debate whether the innkeeper's lien arose in the common law to compensate for the innkeeper's strict duty and liability, or whether it had its origins in a separate, equally venerable custom of the realm. *See, e.g., Hogan, The Innkeeper's Lien at Common Law,* 8 HASTINGS, L.J. 33 (1956). Nevertheless, what passed into American common law with surprising unanimity was the former theory. The Harvard Law Review explained in 1895 that

> As the innkeeper's lien is grounded . . . on the extraordinary liability imposed on him by law, it seems only just that on all goods which he is bound to receive he should have his lien . . . .
>
> *Note,* 9 HARVARD L. REV. 216 (1895).

See also 43 C.J.S. Innkeepers §26(2)(b); 40 Am.Jr. 2d Hotels, Motels, and Restaurants §187. Under that interpretation of the common law, it was clear to American courts that where the extraordinary liability did not exist, neither did the common law lien. The crux of the matter was the relationship between the guest and the owner of the premises. *Cedar Rapids Investment Co.* v. *Commodore*

Hotel Co., 218 N.W. 510, 511 (Iowa 1928), *Dixon* v. *Robbins,* 246 N.Y. 169, 158 N.E. 63, 53 A.L.R. 986 (1927); and the innkeeper-guest relationship with its particular duties was an "essential" predicate for the existence of the common law lien. *Brams* v. *Briggs,* 260 N.W. 785 (Mich. 1935). Hotel, boarding house and lodging house keepers had no absolute duty to accept all transient guests and keep their belongings safe; therefore they had no common law lien against those belongings. *See, e.g., Turner* v. *Priest,* 171 S.E. 881, 882 (Ct.App.Ga. 1933); *Nicholas* v. *Baldwin Piano Co.,* 71 Ind. App. 209, 123 N.E. 226 (1919); *Halsey* v. *Svitak,* 203 N.W. 968, 969 (Minn. 1925); *Jackson* v. *Engert,* 453 S.W.2d 615, 618 (Mo.App. 1970). Several states including Arizona gave them statutory liens to protect them from fraud (*cf. Nance* v. *O.K. Houck Piano Co.,* 128 Tenn. 1, 155 S.W. 1172, 1173 (1913)), but courts have narrowly construed such statutes and have carefully distinguished between common law and statutory liens. In *Turner* v. *Priest, supra,* for example, the court explained:

> At common law a boarding house keeper had none of the privileges of an innkeeper, and could not detain the baggage and effects of a delinquent boarder which were in the boarding house. This state and the several states of the Union have passed laws placing boarding house keepers upon the same footing as to the privileges of an innkeeper in detaining the baggage and effects of a delinquent guest to pay for his charges. The lien given to such innkeepers and boarding house keepers is not created by contract, but by law. Statutes giving to boarding house keepers a lien on the goods of their boarders and the means to enforce the same are in derogation of the common law, and should be strictly construed. [Citations omitted.]
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> 171 S.E. at 882.

The courts of Arizona itself are silent on the common law rights of hotel, boarding house and rooming house keepers. But Arizona has adopted common law rules of decision. Ariz. Rev. Stat. §1-201; *Howell* v. *War Finance Corp.*, 71 F.2d 237, 242-43 (9th Cir. 1934); *John W. Masury & Son* v. *Bisbee Lumber Co.*, 49 Ariz 443, 68 P.2d 679, 687-88 (1937); *Valley National Bank of Ariz.* v. *Avco Development Co.*, 14 Ariz. App. 56, 480 P.2d 671 (1971). It has consistently held to the common law since the first legislature of the Arizona territory passed the Howell Code of 1864. *See Boquillas Land & Cattle Co.* v. *Curtis*, 213 U.S. 339, 345 (1909); *John W. Masury & Son, supra*, 68 P.2d at 686. Following the usual practice, Arizona looks to the law of sister states where necessary to determine common law principles. *See e.g., Shulansky* v. *Michaels*, 14 Ariz. App. 402, 484 P.2d 14, 17 (1971). We must therefore conclude that, in accord with the American rule, hotel and rooming house keepers have no common law lien against the belongings of their guests in Arizona. Whatever lien exists is purely statutory.

From the facts of this case, it is clear that appellee Leland did not enjoy the status of innkeeper.

> At common law an innkeeper entitled to a lien was one who held out his place as one for the entertainment of all respectable transient persons who chose to come to him. The lien was given largely because of his so holding himself out and his consequent duty to entertain all transients or travelers who offered themselves as guests. [Citation omitted.] It was the transient nature of the entertainment contracted for that distinguished the innkeeper from the lodging house or boarding house keeper. [Citations omitted.]
>
> *Cedar Rapids Inv. Co.* v. *Commodore Hotel Co., supra*, 218 N.W. at 511.

There is no evidence that appellee held herself out to transients, and appellants were not transients; the rented room was their permanent residence. Appellee offered nothing but lodging: "[A] place where travelers could obtain lodging only, without other entertainment, was not an inn." *Dixon* v. *Robbins, supra,* 53 A.L.R. at 987. *See also Cochrane* v. *Schryver,* 12 Daly (N.Y.) 174 (1883), *Hardin* v. *State,* 47 Tex. Crim. Rep. 493, 84 S.W. 591 (1905). By the common law standard, appellee was a hotel or lodging house keeper and not an innkeeper. *See generally* Annot., 53 A.L.R. 988; Annot. 19 A.L.R. 517.

Adams appears to call for the foregoing investigation of the common law, and it suggests that state action is more likely found where the common law did not permit the action in question. However the common law analysis cannot, by itself, be dispositive. To rely on it alone might, in some cases, be to induct anomalous, technical or outdated results. *Cf. Davis* v. *Richmond, supra,* 512 F.2d at 203-04. Rather than resting solely on history, we must therefore consider other indicia of state action as well.

B. *Relationship of Property to Debt*

The Adams holding is limited to repossession, and in that context it has been broadly accepted. *See, e.g., Turner* v. *Impala Motors,* 503 F.2d 607 (6th Cir. 1974), *James* v. *Pinnix,* 495 F.2d 206 (5th Cir. 1974), *Bichel Optical Laboratories* v. *Marquette Nat'l Bank,* 487 F.2d 906 (8th Cir. 1974). In adopting it the Fifth Circuit did not see fit to alter its ruling in *Hall* v. *Garson, supra;* instead it left *Hall* intact and distinguished the *Adams*-type situation on the ground that there "the property seized was the property whose purchase had created the debt and in which the seizor had a security interest." *Calderon* v. *United Furniture Co.,* 505 F.2d 950, 951 (5th Cir. 1974).

The same distinction is appropriate in this case. Special interests of the conditional seller attach to the specific goods which serve as his collateral, interests which are not present in the case of a general debt and indiscriminate seizure of property as collateral. *Cf. Mitchell* v. *W. T. Grant Co.*, 416 U.S. 600, 607-08 (1974). Moreover, repossession of the specific chattel giving rise to a debt is an activity much more narrowly confined than general seizures of collateral. The former, particularly where a written instrument defines the rights of the parties, can be left and has traditionally been left to private hands. *See Adams, supra,* 492 F.2d at 336. The latter, because its extent is broad and undefined and because its impact is potenially much more severe, is the type of activity which is a function of the state and over which, ordinarily, the state has a monopoly. *Cf. Shirley* v. *State National Bank*, 493 F.2d 739, 745-47 (2d Cir. 1974) (Kaufman, C.J., dissenting).

C. *Private Contractual Remedies*

Finally, appellants and appellees here had no contractual relationship covering appellants' property, nor does the record show that appellants had any notice or knowledge at the time of renting that appellee Leland could seize their belongings on eviction. Nothing in the dealings of the parties permits the conclusion that appellants agreed or consented in advance to the seizure, either explicitly or by implication. In *Adams* the written agreement of the parties set forth their respective rights and liabilities; the statute there merely reiterated and confirmed their arrangement. Thus, entire apart from the statute, the repossession did no violence to the expectations of the debtor, nor did it deprive him of any rights which he had not already yielded voluntarily and for consideration. In that context the involvement of the state, through its statute, was nearly superfluous.

In the present case, the statute was appellee Leland's sole authority for the seizure, which would not otherwise have been even colorably legal.[2] And since the statute was the *sine qua non* for the activity in question, the state's involvement through that statute is not insignificant.

For the above reasons, we find that the State of Arizona has significantly involved itself in appellee Leland's seizure of appellants' property, under the standards set forth in *Adams* v. *Southern California First National Bank, supra.*

We recognize that our decision puts us squarely in conflict with the First Circuit. The facts in *Davis* v. *Richmond, supra,* could hardly be closer to the ones in this case. We agree with the court in *Davis* that "The focus for state action purposes should always be on the impact of the law upon private ordering." 542 F.2d at 204, *quoting* Burke and Reber, *State Action, Congressional Power and Creditors Rights: An Essay on the Fourteenth Amendment,* 47 S.CAL.L.REV., 1, 47 (1973). But we disagree with the proposition that lien statutes which create new rights in favor of creditor landlords have only a minimal impact on private ordering, especially when the parties themselves have failed to agree on a like ordering in the particular case.

Davis seems to turn on the judgment of the court that a landlord's seizure of the belongings of an evicted tenant was something to be expected in the ordinary course of private affairs, statute or no; the court described that action as "an obvious and not surprising course." 512 F. 2d at 203. In the circumstances of this case, we find ourselves unable to agree, since we cannot say with confidence that appellants should have expected appellee Leland to do what she did.

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[2] See section A., *"Rights at Common Law", supra.*

The dismissal below is reversed and the case is remanded for further proceedings.

ELY, Circuit Judge (Concurring):

I concur in the result reached by Judge Weigel in his carefully studied opinion. Since I cannot agree, however, with all that Judge Weigel has written, *see infra* n.5, I have concluded that I should separately state my views.

Acting under the authority conferred by Arizona's innkeeper's lien statutes, Alice Leland seized clothing, food, medicines, and stereo equipment that belonged to her renters, the Culbertsons, in order to satisfy rent claimed by Leland to be unpaid. Leland owned no security interest in the seized items, nor did she possess any other form of contractual right thereto. Rather, after informing the Cubertsons that they were evicted from the $20 per week room in which they had been living, she indiscriminately seized and held all of the belongings that remained in the room. By summarily depriving the Culbertsons of their property, without their consent, in order to satisfy an alleged debt, Leland performed a function that, in my view, belongs only to the state.

The facts here presented are virtually identical to those in *Hall* v. *Garson,* 430 F.2d 430 (5th Cir. 1970), in which a landlady, acting pursuant to the Texas landlord's lien statute, seized a television set from a tenant's apartment in order to satisfy the landlady's claim for unpaid rent. Reasoning that the landlady had performed a function indistinguishable from that of executing a judgment, a function that has normally and traditionally been reserved for governmental officers, the Fifth Circuit held that the landlady's action constituted state action. 430 F.2d at 438-40.

In *Adams* v. *Southern California First National Bank*, 492 F.2d 324 (9th Cir. 1973), *cert. denied*, 419 U.S. 1006 (1974), our court held that a creditor's repossession of an automobile pursuant to the self-help provisions of the Uniform Commercial Code is not state action. In *Adams*, we expressly distinguished the different facts of *Hall*. We noted that the landlady in *Hall* had seized property in which she owned no interest, while in *Adams*, creditors had repossessed vehicles in which they held a security interest or ownership rights pursuant to an installment sales contract. Further, we observed that *repossession* of property by a creditor or conditional seller has long been accepted as a private remedy,[1] while, on the other hand, the outright seizure of property unrelated to any alleged debt, which was at issue in *Hall*, had been a function traditionally reserved to the state. 492 F.2d at 335-37.

Since our decision in *Adams*, the Fifth Circuit has had an opportunity to reexamine *Hall* in the context of facts similar to those considered by us in *Adams*. That opportunity arose in *James* v. *Pinnix*, 495 F.2d 206 (5th Cir. 1974). There, an automobile dealer repossessed a vehicle from a customer to whom he had sold the machine on an installment contract basis. Agreeing with our *Adams* decision, the Fifth Circuit held that such self-help repossession does not constitute state action. The court distinguished *Hall* in much the same way as was done by us in *Adams*, writing that

> [the] Hall state function concept does not carry over to the present case with sufficient force to compel a finding of state action. In Hall the landlady seized goods to satisfy a debt arising out of an agreement

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[1] *Cf. Mitchell* v. *W.T. Grant Co.*, 416 U.S. 600, 607-08 (1974) (discussing the special interests of the creditor or conditioned seller in the specific goods that serve as his security).

> having nothing to do with the goods. Such a taking closely resembles a seizure in satisfaction of a judgment—a function traditionally performed by a sheriff or other state agent. In the present case, by contrast, the appellant-creditor possessed and claimed no roving commission to extract appellee's goods to satisfy a separate debt. Rather, he had a specific purchase money security interest in a particular item, and he seized only that item.

495 F.2d at 208. *See also Calderon* v. *United Furniture Co.*, 505 F.2d 951 (5th Cir. 1974) (per curiam) (finding the self-help repossession of a washing machine in which the creditor held a security interest to be governed by *James*, rather than *Hall*).

In my view, the principle that has emerged from *Hall* is unquestionably sound. The state has, and must retain, a monopoly over the power to exercise "a roving commission to extract [a debtor's] goods to satisfy a separate debt." *James* v. *Pinnix, supra* at 208. As held in Hall and recognized in Adams, such a power has traditionally reposed only in the officers of the state. Furthermore, I hold the firm conviction that the exercise of such a power is so fraught with dangers that it must be retained in the state so that it can be circumscribed by due process protections.[2]

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[2] *Cf. Boddie* v. *Connecticut*, 401 U.S. 371, 374-75 (1971); *Shirley* v. *State Nat'l Bank*, 493 F.2d 739, 745-47 (2d Cir.) (Kaufman, Chief Judge, dissenting), *cert. denied*, 419 U.S. 1009 (1974). One commentator has observed that *Fuentes* v. *Shevin*, 407 U.S. 67 (1972), seems to endorse the principle that ". . . the power of the state to interfere physically with the status quo may not be delegated in law or fact to private persons." Yudof, *Reflections on Private Repossession, Public Policy, and the Constitution*, 122 U.Pa.L. Rev. 954, 972 (1974). From such a broad view of *Fuentes*, our court has already carved an exception for self-help repossession by a creditor or conditional seller. *Adams* v. *Southern Cal. First Nat'l Bank*, 492 F.2d 324 (9th Cir. 1973), *cert. denied*, 419 U.S. 1006 (1974).

Significant perils necessarily attend the arbitrary seizure, even by disinterested state officers, of an alleged debtor's personal belongings. The asserted debt may not be valid, and the seizure may therefore be wholly unjustified. Resistance from the debtor, with concomitant violence, may occur. The property seized may have a value that greatly exceeds the debt, or, on the other hand, the property seized may be essential to the satisfaction of the basic human needs of the alleged debtor and his family. *Cf. Fuentes* v. *Shevin,* 407 U.S. 67, 80-81 (1972). These perils are not diminished but are undeniably magnified when the state delegates power to conduct such a seizure to the person to whom the debt is allegedly owed.[3] *Cf. Lindsey* v. *Normet,* 405 U.S. 56, 71 (1972).

There is substantial support in Supreme Court precedent for the application of a public function test, like that applied in *Hall,* to determine whether certain acts of a private party constitute state action. In *Jackson* v. *Metropolitan Edison Co.,* 419 U.S. 345 (1974), the Court held that a state regulated, but privately owned, electric utility corporation did not act as the state when it terminated a

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[3] One can scarcely imagine seizures more egregiously indiscriminate than the one before us now. According to the Culbertsons' complaint, Helen Culbertson is a diabetic and almost totally blind. Among the items that Leland seized were Helen Culbertson's specially-processed diabetic food, prescription medicine for her eyes, and other medicine, prescribed by a veterinarian, for her seeing-eye dog. Leland also seized Charles Culbertson's prescription medicines and special clothing that was required for his job as a cook. None of these items could have had more than minimal resale value; consequently, they could have been of little use to Leland in satisfying the Culbertsons' alleged debt. But they were of critical and undeniable importance to the Culbertsons. I have no doubt that the items would have been exempt from any execution ordered by a state court.

customer's service because the customer allegedly had not paid her bills. Noting that the State of Pennsylvania, wherein the incident occurred, had obligation to provide its citizens with electric power, the Court rejected the argument that the utility's action was state action because the utility was performing a public function. The Court left open the possibility, however, that the utility's action could be state action if the utility engaged in functions that were truly those of the state. The Court noted:

> We have, of course, found state action present in the exercise by a private entity of powers traditionally exclusively reserved to the State. *See e.g., Nixon* v. *Condon,* 286 U.S. 73 (1932) (election; *Terry* v. *Adams,* 345 U.S. 461 (1953) (election); *Marsh* v. *Alabama,* 326 U.S. 501 (1946) (company town); *Evans* v. *Newton,* 382 U.S. 296 (1966) (municipal park). If we were dealing with the exercise by Metropolitan of some power delegated to it by the State which is traditionally associated with sovereignty, such as eminent domain, our case would be quite a different one.

419 U.S. 352-53. [4]

Believing that the case at hand falls squarely within the rationale of *Hall,* I concur in Judge Weigel's conclusion that Leland's seizure of the Cubertsons' property pursuant

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[4] The Court's mention of eminent domain as an example of a power "traditionally associated with sovereignty" is, I think, particularly instructive within the context of this case. Like the power exercised here, the power of eminent domain, when conferred by a state on a private party, would enable that party to seize the property of another for his own purposes.

to the Arizona innkeeper's lien statutes constituted action by the state.[5]

CHOY, Circuit Judge (dissenting):

I respectfully dissent.

In *Adams* v. *Southern California First National Bank*, 492 F.2d 324 (9th Cir. 1973), *cert. denied*, 419 U.S. 1006 (1974), this court rejected a due process challenge to the self-help repossession provisions of the Uniform Commercial Code. A number of theories had been advanced to establish state action in the statutory authorization of repossession, each of which we rejected. Our discussion in *Adams* of each of these proposed grounds for finding state action is, with one exception, equally applicable to our consideration of Arizona's innkeeper's lien statute. That one exception is the "public function" analysis upon which the Supreme Court relied to invalidate racially discriminatory

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[5] The aspect of Judge Weigel's scholarly opinion with which I cannot agree is that wherein reliance is placed upon a distinction between rights conferred by the common law and those created by later statutory enactment. I think it preferable to follow the approach taken in *Hall* and suggested in *Metropolitan Edison*, an approach which focuses upon the power or function being exercised in its relationship to the state, rather than to perpetuate common law distinctions which may have become obsolete. To this extent alone I agree with the First Circuit's comments in *Davis* v. *Richmond*, 512 F.2d 201, 203-04 (1st Cir. 1975). *But cf. Adams* v. *Southern Cal. First Nat'l Bank, supra* n.2. A distinction drawn upon the basis of common law rights vis-a-vis statutory rights creates unfortunate anomalies. This is dramatically illustrated by the fact that, under Judge Weigel's analysis, the actions of Alice Leland, who operated a small, low rent boarding house, were those of the state while the same actions of the operator of a large, modern hotel, who caters to transient guests, provides food and entertainment, and therefore qualifies as an "innkeeper," are not. I cannot conscientiously accept such a disparity.

practices in political party primaries. *Smith* v. *Allwright,* 321 U.S. 649 (1944); *Terry* v. *Adams,* 345 U.S. 461 (1953).

The Fifth Circuit relied on this public function analysis to find state action and invalidate a landlord's lien in *Hall* v. *Garson,* 430 F.2d 430 (5th Cir. 1970). The court found that the action taken by the landlord, "the entry into another's home and the seizure of another's property was an act that possesses many, if not all, of the characteristics of an act of the State." *Id.* at 439. The Court quoted from *United States* v. *Classic,* 313 U.S. 299, 326 (1941): "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law."

The landlady in *Hall* had entered the tenant's apartment, as authorized by the Texas lien statute, and seized a television set as payment for overdue rent. The tenant returned to her apartment and discovered the set gone. Under those facts, I might agree that the landlady was "clothed with the authority of state law," and thus subject to the restrictions of procedural due process. Unlike the landlady in *Hall,* however, Mrs. Leland did not invade the tenants' dwelling in order to seize the property. Having exercised her right of eviction to terminate the tenancy, she necessarily came into possession as bailee of the Culbertsons' property. The Culbertsons now demand that she restore their goods to them despite her doubt that she will receive the rent owed her.

The Fifth Circuit found in *Hall* that Texas law authorized the landlady to serve a governmental function in two respects: entry into the tenant's residence and seizure of his property. 403 F.2d at 439. Both are delegations by the state of the power—a power over which the state pos-

sesses a natural monopoly—to interfere coercively with possessory interests in property. *See* Yudof, *Reflections on Private Repossession, Public Policy and the Constitution,* 122 U. Pa. L. Rev. 954, 972 (1974). I agree with my Brother Ely regarding the dangers attendant on parceling this power out to individual creditors. Nevertheless, we clearly held in *Adams* that the state could delegate the power to repossess an automobile pursuant to U.C.C. § 9-503 without becoming "significantly involved" in the creditor's activities. The dangers inherent in such delegations include the potential for violence and the invasion of the individual's reasonable expectations of privacy. *Id.* at 978-80. Seizure of an automobile, or of other property which can be repossessed without the need of invading the debtor's residence, arouses less concern on both points than does a repossession which requires entering a home. Furthermore, section 9-503 explicitly restricts the right of repossession to those instances when it can be accomplished without a breach of the peace.

I would interpret *Adams* as holding without qualification that a creditor authorized by state law to seize property of his debtor, where this can be done without a breach of the peace, does not perform a public function so as to constitute state action. Two possible limitations have been suggested, neither of which I can accept.

Judge Weigel believes that *Adams* should be limited to repossessions authorized by a security agreement contracted between the parties. I do not believe that the existence of such an agreement is material. The debtor's defense might be a denial of the existence and validity of such an agreement. Until a hearing has been held, the claims that the debtor has granted a security interest to the creditor and has consented to repossession in case of default,

as well as that he has defaulted, or no more than allegations by the creditor. Until the debtor's consent to repossession has been judicially established, all attempts to reclaim goods by self-help run the same risks of violence and invasion of privacy, regardless of the purported existence of a security agreement. If state action is not present in one case, it should not be found in the other.

Another possible limitation proposed by Judge Weigel is suggested by language in *Adams* itself. I strongly question *Adams'* dictum that *Hall* might be distinguished because in *Hall* the creditor had seized property which "belonged to the tenant" rather than property "that had been entirely his and that, practically and according to the terms of the contract, the debtor had not yet paid for." 492 F.2d at 336. *Fuentes* v. *Shevin*, 407 U.S. 67, 86-87 (1972), emphasises that the critical property interest at stake in the context of prejudgment seizure is the right of the possessor to continued possession pending litigation of the claimant's claim. Until a hearing has been held, the creditor's ownership of the property is entirely speculative and unresolved, and the only undisputed issue is the debtor's present possession of the property.

If we are to hold that *Adams'* application depends on the "relationship of property to debt," the creditor finds his power to repossess before a hearing depending paradoxically on a fact that will not be established until a hearing is held. Even with the caveat that the creditor may not repossess if a breach of the peace is threatened, the possibility of violence is obviously increased when the debtor's right to resist repossession before a hearing turns on a necessarily undetermined fact. Furthermore, the appeal to history—asserting that a creditor's power to repossess an

item sold under contract was recognized at common law while his right to seize property unrelated to the debt is a statutory invention—seems immaterial to determining the existence of state action.[1] I concur in Judge Ely's rejection of this spurious distinction in footnote 5 of his concurring opinion.

As I would interpret *Adams,* I could concur in *Hall* only because of the grave threat to privacy interests occasioned by permitting a creditor to intrude upon the residential privacy of the debtor in quest of collateral. *Cf. Stanley* v. *Georgia,* 394 U.S. 557 (1969); *Breard* v. *Alexandria,* 341 U.S. 622 (1951). Mrs. Leland, on the other hand, entered the Culbertsons' apartment only after their tenancy had been terminated lawfully, and their right to expect and demand privacy had ended.[2] The state permitted Leland the exercise of no "public function" in authorizing her to retain a bailment as security for a debt. The First Circuit has held analogously that a bank may set off deposits against debts unrelated to the deposits. *Fletcher* v. *Rhode Island Hospital Trust National Bank,* 496 F.2d 927 (1st

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[1] [W]e are disinclined to decide the issue of state involvement on the basis of whether a particular class of creditor did or did not enjoy the same freedom to act in Elizabethan or Georgian England.

Davis v. Richmond, 512 F.2d 201, 203 (1st Cir. 1975).

[2] In *Davis* v. *Richmond,* 512 F.2d 201 (1st Cir. 1975), the court found no state action even when the tenancy was not, apparently, terminated. The landlord did not enter the tenant's room to seize his personal effects, but prevented him from removing them from the premises. Where the landlord has an effective control over the entry to the rented premises, this procedure would protect his lien in the tenant's goods without necessitating an invasion of the tenant's dwelling.

Cir.), *cert. denied,* 419 U.S. 1001 (1974). The Seventh Circuit has held that retention of an automobile pursuant to a mechanic's lien is not the exercise of a public function so as to be state action. *Phillips* v. *Money,* 503 F.2d 990 (7th Cir. 1974), *cert. denied,* 420 U.S. 934 (1975). I agree with the court's common-sense statement in *Fletcher:*

> [W]hatever the truth of the old saw that possession is nine-tenths of the law, a creditor who holds something of value to his debtor is differently situated from one who does not: he does not need the state to facilitate his collection efforts.

496 F.2d at 930. *See Davis* v. *Richmond,* 512 F.2d 201 (1st Cir. 1975).

The great central theme of *Fuentes* is that the state should not disrupt the possessory status quo until a hearing has been held to resolve the merits of the conflicting claims. The state has not obstructed this objective by allowing Mrs. Leland to retain her control over property to which the legal rights are in dispute. More broadly, in the absence of an invasion of the privacy interests of the home, I believe that *Adams* forecloses any claim that the state has deprived the debtors of due process by allowing self-help repossession pursuant to an asserted consensual or statutory lien.

I would affirm the dismissal by the district court.